Supreme Court, U.S.
APR 5 - 2010
OFFICE OF THE CLERK

No. 09-1008

In The
SUPREME COURT OF THE UNITED STATES

MICHAEL A. SCOTT, *pro se*
TERRY A. SCOTT, *pro se*

Petitioners

v.

SAMUEL I. WHITE, P.C., et al.

Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Michael A. Scott, *pro se*
Terry A. Scott, *pro se*
P. O. Box 6872
Virginia Beach, Virginia 23456-0872
757.831.7374
Email—myscottfamily@msn.com

TABLE OF CONTENTS

Table of Authorities iii

Jurisdiction Statement 1

Argument Summary 1

Argument 2

1. Michael Scott's Challenge To The 2001 Order As Applied Against Him Is Not Time Barred . 2

   A. Scott Did Not Waive The Right To Claim That 2001 Order Was Void As Applied To Him 2

   B. Res Judicata Does Not Bar Scott's Challenge To The 2001 Order And How That Order Has Been Applied . . . 3

2. The Scotts Were Denied Due Process . 4

   A. The Scotts Received No Notice From The Trial Court . . 5

   B. The October Order Imposed Criminal Sanctions . . 5

   C. The October Order Applied Solely To Scott, Not To Mrs. Scott 6

3. The Scotts Were Deprived Of Their Property Interests . . . 7

A. Scott Had A Vested Right And Property Interest . . 7

B. Certain Respondents Were In Default 9

C. A General Appearance Was Made 10

D. Responsive Pleadings Were Required To Be Filed In This Case 10

4. The October Order And Dismissal Order Are Void For Want Of Necessary Parties 12

Conclusion 13

TABLE OF AUTHORITIES

Carswell v. Masterson, 224 Va. 329, 295 S.E.2d 899 (1982) . . . 6

Clephas v. Clephas, 1 Va. App. 209, 336 S.E.2d 897 (1985) . . . 5

Godbolt v. Brawley, 250 Va. 467, 463 S.E.2d 657 (1995) . . . 3

Jetco, Inc. v. Bank of Virginia, 209 Va. 482, 165 S.E.2d 276 (1969) . . . 6

Rawlings v. Lopez, 267 Va. 4, 591 S.E.2d 691 (2004) . . . 4

Winchester & C. R. Co. v. Commonwealth, 106 Va. 264, 55 S.E. 692 (1906) . . 3

Virginia Code

Virginia Code § 8.01-124 10

Virginia Code § 8.01-380(B) . . . 8,9

United States Supreme Court Rules

Supreme Court Rule 14.1 1

Supreme Court Rule 15 . . . . 1, 4

Virginia Supreme Court Rules

Virginia Supreme Court Rule 3:8 . . 11

Virginia Supreme Court Rule 3:19 . . 11

JURISDICTION STATEMENT

The respondents' contended that Rule 14.1(i) required the Scotts to quote from the record the specific portions where federal questions were raised. The Scotts have alleged the part of the record where they raised the constitutional issues. The respondents have not, nor could they, dispute that the constitutional issues raised in the petition were not raised in the Virginia courts exactly where and how the Scotts contend they were raised. The respondents had a duty under Rule 15 to point out their perceived misstatement of facts and law by the Scotts that would bear on what issues properly would be before this Court. The respondents have addressed the constitutional issues without exception as to the issues having been raised in the Virginia courts.

ARGUMENT SUMMARY

The respondents' argument was premised on their perception of the 2001 order and of the October order rather than on the plain meaning of the actual language employed by the respective courts in those orders. Scott's challenge to the 2001 order does not come too late as this is the first instance in which enforcement of the 2001 order and a contempt order based on it have been made against him.

No where in the October order did the Norfolk Court order that this case be dismissed with prejudice. The respondents' assertion and the trial court's finding of the "intent" of the language of the October order rather than the actual language

employed underscores why the Scotts were denied due process by making for the first time in dismissing this case the finding that it was the intent of the October order that this case be dismissed with prejudice. Ordinarily, intent is a state of mind subject to being rebuffed that should have been resolved, in this instance, by a jury.

ARGUMENT

1. Michael Scott's Challenge To The 2001 Order As Applied Against Him Is Not Time Barred

A. SCOTT DID NOT WAIVE THE RIGHT TO CLAIM THAT 2001 ORDER WAS VOID AS APPLIED TO HIM

The Norfolk Court contempt proceeding was the first time that the 2001 order had ever been enforced against Scott out of which that court rendered the October order. Since the October order was derivative of the enforcement of the 2001 order, it was appropriate for Scott to challenge on constitutional grounds both orders.

Neither the 2001 Petition for Appeal nor the denial of Petition I dealt with the enforcement of the 2001 order against Scott. It is the enforcement of the 2001 order which is the issue here. If the 2001 order is void, then any subsequent order premised on it would be void as well.

B. RES JUDICATA DOES NOT BAR SCOTT'S CHALLENGE TO THE 2001 ORDER AND HOW THAT ORDER HAS BEEN APPLIED

It is noteworthy that Petition I and Petition II referred to in the respondents' brief related to mandamus/prohibition proceedings that involved the criminal contempt for which Scott was being prosecuted. There are two reasons under Virginia law that those petitions can have no preclusive effect.

First, because the petitions dealt with criminal related matters, "a judgment of conviction or acquittal in a criminal prosecution does not establish in a subsequent civil action the truth of the facts on which it was rendered....and such judgment of conviction or acquittal is not admissible in evidence." *Godbolt v. Brawley*, 250 Va. 467, 470, 463 S.E.2d 657, 659 (1995). Second, both petitions were denied because the responding judge's defense was that the acts sought to be compelled or prohibited had already been completed or that Scott could appeal the judge's rulings. *See Winchester & C. R. Co. v. Commonwealth*, 106 Va. 264, 55 S.E. 692 (1906)("An order denying a writ of mandamus is not such a judgment as concludes further inquiry as to the grounds on which the writ is sought.").

The respondents never raised a *res judicata* argument in the trial court and the Scotts so argued that issue in the Supreme Court of Virginia. However, without a written opinion from that court, it cannot be determined how that court treated the

respondents' failure to raise the defense in the trial court as its rules of court would have prohibited consideration of their argument. Nevertheless, all of the elements for application of *res judicata* are lacking: identity of the cause of action, remedies sought, quality of persons, and parties. *Rawlings v. Lopez*, 267 Va. 4, 591 S.E.2d 691 (2004).

2. The Scotts Were Denied Due Process

This Court's Rule 15 required the respondents to point out to this Court in their brief "any perceived misstatement in the petition." Of course, there were no misstatements in the petition.

The most notable of the assertions in the petition was that the trial court found *sua sponte* and as its final act that the Scotts were in violation of the October order. The trial court's final order (App. 3-5) made clear the matters it considered. It was quite clear that the trial court found the Scotts to be in violation of ***only*** the October order as the basis for dismissing this case.

Absent from the respondents' argument was any mention that Landmark demurred to the complaint in this case and also filed a motion for sanctions against Scott based on its assertion that Scott violated the 2001 order when he filed this case. The order dismissing Landmark also denied its motion for sanction. Denial of Landmark's motion for sanctions was an explicit rejection by the trial court of any notion that Scott violated the 2001 order by filing this case and this issue had become law-of-the case. In order to avoid that effect, the

respondents' forum shopped in the Norfolk Court seeking another way to bring the charge against Scott.

A. THE SCOTTS RECEIVED NO NOTICE FROM THE TRIAL COURT

Under Virginia law, "a court may speak only through its written orders." *Clephas v. Clephas*, 1 Va. App. 209, 336 S.E.2d 897 (1985). The trial court issued two orders as to these respondents: an order in July 2008 denying the Scotts' motion for injunctive relief and the final order. No orders exist notifying the Scotts that the trial court was considering them to be in violation of the October order or the 2001 order.

B. THE OCTOBER ORDER IMPOSED CRIMINAL SANCTIONS

The respondents' suggested that it was "important to note that the Norfolk Court...found him in civil contempt." *Resp. Br.*, p. 11. Of course, the Norfolk Court characterized its contempt finding as civil. **What is notable is that the no where in the October order did the Norfolk Court explicitly state that Scott violated the 2001 order or any other order when he filed this case**. The Norfolk Court qualified its civil contempt finding by stating that Scott "abused the permission granted" (App. 41) to defend against the foreclosure that is the subject of this case.

Arguably, this is akin to finding Scott to be in civil contempt "for acting in bad faith" rather than

willfully disobeying the 2001 order. *Carswell v. Masterson*, 224 Va. 329, 332, 295 S.E.2d 899, 901 (1982)(A trial court "has the authority to hold [an] offending party in contempt for acting in bad faith or for willful disobedience of its order."). The October order was silent as to whether the basis for the civil contempt was "acting in bad faith" or "willful disobedience." This was a fatal due process deficiency with the order.

C. THE OCTOBER ORDER APPLIED SOLELY TO SCOTT, NOT TO MRS. SCOTT

The relevant portion of the October order stated, "Scott shall dismiss all matters filed by him pending in the Circuit Court of the City of Virginia Beach." (App. 41). There was no mention or finding in the October order regarding Mrs. Scott. *Jetco, Inc. v. Bank of Virginia*, 209 Va. 482, 486, 165 S.E.2d 276, 279 (1969) ("It is well settled that a court may not adjudicate the rights of one who is not a party to the proceeding").

The respondents' speciously contended that "[i]t is not denied that Terry Scott knew of the 2001 Order." *Resp. Br.*, p. 12. It is not admitted that Mrs. Scott knew of the 2001 order. The interveners attempted to get the Norfolk Court to sanction Mrs. Scott during the contempt proceedings and that attempt was rejected out of hand and the presiding judge admonished the interveners not to go there. Neither the Norfolk Court nor the trial court made a finding that "Terry Scott knew of the 2001 Order."

The so-called "tortured path" of the Zephyr property litigation is irrelevant. What the respondents failed to mention (and which is relevant here) was that the District Court in its opinion and order dismissing the prior federal court case related to the Zephyr property expressly stated in a footnote that the Scotts were free to pursue their Zephyr property foreclosure claim in the state court upon disposing of the federal claims, even though the court entered a pre-filing injunction in that case.

Mrs. Scott voluntarily filed a response to the respondents' objection to nonsuit, but only to raise the point that she was not a party to Scott's motion for nonsuit. Mrs. Scott's claims in this case should have gone forward to trial had the trial court allowed Scott to do what the October order required of him—to dismiss all matters filed by him in this case. Scott had no authority to dismiss Mrs. Scott's "matters" and Scott did not need to be a party to Mrs. Scott's contract claim.

3. The Scotts Were Deprived Of Their Property Interests

A. SCOTT HAD A VESTED RIGHT AND PROPERTY INTEREST

The October order had the full force and effect of the law in Virginia. With inherent power, the Norfolk Court bestowed on the interveners and on Scott tangible rights and interests.

The respondents' contended that Scott had no property interest in his right to nonsuit this case

under Virginia Code § 8.01-380(B) because this case was not a validly pending action that could be nonsuited. This argument is meritless and the cases they cited are not on point here. The following were filed and or disposed of by the trial court:

- Demurrer by Landmark;
- Motion to Dismiss by Landmark;
- Motion for Sanctions by Landmark;
- Motion to Dismiss by respondents' Samuel I. White, P.C. and Jason Hamlin;
- Motion for Sanctions by respondents' Samuel I. White, P.C. and Jason Hamlin;
- Motion for Injunctive Relief by the Scotts;
- Objections to Discovery by the corporate respondents;
- Motion for Default Judgment by the Scotts;
- Renewed Motion for Injunctive Relief;
- Motion for Injunctive Relief by Mrs. Scott;
- Objection to Nonsuit by the respondents, except MERS;
- Motion to Dismiss filed by MERS after trial court dismissed case; and
- Motion for Reconsideration by the Scotts.

In this Court is the first time the respondents have ever raised an issue as to the validity of this case and is, therefore, too late, especially when the October order did not explicitly state that Scott violated the 2001 order or any other court order when he filed this case. This Court should not be the final word on this important issue of state law. Even if such an argument was considered, the issues outlined above that were before the trial court and the trial court's disposal of many of the issues belied

the nullity argument and set this case apart from those on which the respondents relied.

The Virginia Legislature bestowed on Scott the right to suffer a nonsuit of this case under Virginia Code § 8.01-380(B) to which he had a legitimate claim of entitlement since all of the statutory prerequisites were met. The Virginia Courts have not declared this case to be illegitimate or a nullity or without legal effect and this Court should decline to do so.

B. CERTAIN RESPONDENTS WERE IN DEFAULT

One thing is clearly admitted by the respondent—they did appear in the trial court on July 8, 2008 "to object to the court's jurisdiction for several reasons." *Resp. Br.*, p. 17. Virginia law is clear as pointed out in the petition that the respondents' should have appeared and actually objected to the trial court's jurisdiction. MERS did not appear at the July 8, 2008 hearing, but did waive service of summons after the contempt proceedings were well underway and in which it did not participate. MERS was in default by virtue of its waiver and failure to timely file responsive pleadings.

The remaining corporate respondents, excepting Samuel I. White, P.C., were in default. Even if their general appearance on July 8, 2008 was not considered, they invoked the trial court's jurisdiction when they filed in August 2008 objections to discovery in this case. Even if the

discovery objections invoking the trial court's jurisdiction were not considered, the Norfolk Court entered the October order on October 28, 2008 and it was not until late December 2008 when they filed the objection to nonsuit in the trial court. Therefore, no matter which event one considers, they were in default by their failure to timely file responsive pleadings. The trial court did not grant MERS leave to file late responsive pleadings and MERS did not ask for leave either.

C. A GENERAL APPEARANCE WAS MADE

The respondents' argument here made clear that they did not object to the trial court's jurisdiction when they appeared on July 8, 2008 and successfully argued for denial of the Scotts' motion for injunctive relief. Their argument that the general district court had exclusive jurisdiction over unlawful detainer actions, though not relevant because they did not make the argument in the trial court, is belied by Virginia Code § 8.01-124 ("Motion for judgment in circuit court for unlawful entry or detainer").

D. RESPONSIVE PLEADINGS WERE REQUIRED TO BE FILED IN THIS CASE

The respondents argued that by timely filing their motion to intervene in the Norfolk Court as opposed to filing responsive pleadings in the trial court, that no further response was necessary in the trial court. The Norfolk Court did not enter an order

until August 7, 2008 (App. 44-47) granting permission to intervene in the Norfolk case. Meanwhile, the decision to permit intervention was purely discretionary and not assured under normal circumstances. The respondents could not pin their refusal to file statutorily mandated responsive pleadings in the trial court on the hope of being allowed to intervene in the Norfolk case.

The respondents' comity argument fails because as noted above, much litigation had occurred in this case long before the Norfolk Court permitted intervention. Significantly, the Norfolk Court refused to stay the proceedings in this case in the August 7, 2008 order (App. 44-47) though the interveners requested a stay. Indeed, recognizing that litigation of this case continued unimpeded, the corporate respondents filed objections to discovery in the trial court after the order was entered rejecting their stay request.

The Scotts had a legitimate claim of entitlement to a default judgment against certain of the corporate respondents by automatic operation of Virginia Supreme Court Rule 3:19(a) when they failed to timely file responsive pleadings. Plainly put, there was no discretion involved and this entitlement accrued long before the Norfolk Court's contempt finding. The respondents' reliance on Virginia Supreme Court Rule 3:8 did not aid their cause. Under the part (b) of that rule, the court did have discretion to permit additional time to file an "answer," but only after having disposed of "all motions, demurrers and other pleas filed by a defendant." And, of course, a motion, demurrer and

plea were considered responsive pleadings that could avoid a defendant's default.

4. The October Order And Dismissal Order Are Void For Want Of Necessary Parties

The interveners invoked the Norfolk Court's jurisdiction with their motion to intervene and for show cause hearing. If they were seeking dismissal of this case against Mrs. Scott, then they should have so asked the Norfolk Court. The Norfolk Court rejected their attempt to obtain sanctions against Mrs. Scott during the contempt proceeding. If the October order was to apply to Mrs. Scott, then she should have been made a party to the contempt proceeding by the Norfolk Court at the behest of the interveners. That was not Scott's burden to carry.

In both the Virginia Supreme Court and in the petition in this Court, the Scotts have been consistent in asserting that the trial court found them to be in violation of the October order without notice and opportunity for a hearing. Mrs. Scott had a legitimate claim of entitlement to her claims in this case for both properties. Contrary to the respondents' contentions, the Zephyr property claim was plainly set out separately in the complaint and alleged solely by Mrs. Scott. The Zephyr property claim related to a contract, i.e., deed of trust, to which Mrs. Scott was a party and Scott did not need to participate in that claim in order for the trial court to award her complete relief.

The bottom-line here is that the respondents invoked the trial court's equity jurisdiction with

their objection to Scott's motion for nonsuit and this case was dismissed. Dismissal of this case directly affected the rights of MERS, Prime Equity and Mr. Edward Barcliff, Jr., neither of whom sought or requested relief and had not yet appeared prior to the dismissal of this case. The law is quite clear as to the requirement for appearance of those defendants under equity jurisdiction. Similarly, neither Mrs. Scott, MERS, Prime Equity nor Mr. Barcliff participated in the contempt proceedings. Consequently, both the October order and the final order in this case are void for want of necessary parties.

CONCLUSION

This is a clear cut case of due process denial by the Virginia courts. The Scotts' request respectfully that the Court grant their petition.

Respectfully submitted,

Michael A. Scott
Petitioner, *pro se*

Terry A. Scott
Petitioner, *pro se*

Michael A. Scott
Terry A. Scott
P. O. Box 6872
Virginia Beach, Virginia 23456-0872
757.831.7374
Email—myscottfamily@msn.com